

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JULIAN H. HOLLEY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Asheville, N.C.

*Docket No. 97-139; Submitted on the Record;  
Issued October 7, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof to establish that his condition or disability on or after October 1, 1994 is causally related to his employment injury of September 29, 1994; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

On September 29, 1994 appellant, then a 49-year-old temporary employee, filed a claim for mid to low back pain sustained the same date as he was pulling and tugging on a pile of sheets in the holding vat while operating the sheet machine. He checked the box to indicate he wanted continuation of pay and additionally submitted a Form CA-7 claiming wage-loss compensation for the periods September 30 through October 28, 1994 and August 4, 1995 onwards. Appellant sought medical attention on site and finished the remainder of his shift. The employing establishment physician who examined appellant on September 29, 1994, ordered appellant to perform limited-duty work with the restrictions of no pulling over 20 pounds for 2 days. The Office accepted the claim for lumbosacral strain. Appellant's temporary assignment ended September 30, 1994.

In a medical report dated April 28, 1995, Dr. Sean R. Maloney, a Board-certified physician specializing in physical medicine and rehabilitation, noted that appellant initially presented, on April 28, 1995, with chief complaints of low back and hip pain. Appellant described his employment injury and stated that he had some difficulty with back pain while serving in the air force between 1964 and 1969. Appellant stated that he suffered one previous low back injury in 1983 while working at the Veterans Administration Medical Center in Oteen. Appellant could not recall any other injuries to his neck or back and stated that he has not suffered any fractures to the upper or lower extremities or had previous surgeries or illnesses requiring hospitalization. Dr. Maloney reviewed the September 30, 1994 x-rays of appellant's thoracic and lumbar spines and noted a mild to moderate spondylosis of the thoracolumbar spine, particularly involving three levels in the mid-thoracic spine, with anterior spondylosis and spondylosis in the mid to lower lumbar spine including the L1 and L2 levels on the left and L4

and L5 levels on the right. Dr. Maloney conducted a musculoskeletal and neuromuscular examination of appellant and provided an assessment of persistent low back and left hip pain following a lumbar strain at work in September 1994; persistent myofascial pain syndrome involving the back and left hip muscles; and noted that appellant's neuromuscular examination appeared normal with respect to reflexes, sensation and motor strength. Periodic medical progress notes were provided documenting appellant's progress.

In a July 11, 1995 referral request for physical therapy, Dr. Maloney wrote down degenerative disc disease of the spine as the primary diagnosis and fibromyalgia as the secondary diagnosis.

In an August 8, 1995 Form CA-20 report, Dr. Maloney diagnosed persistent low back and left hip pain and noted that appellant was totally disabled from September 30 through October 28, 1994, partially disabled from October 29, 1994 through August 3, 1995, and able to resume light duty on August 4, 1995. Dr. Maloney checked "yes" to the medical form report question on whether appellant's condition was related to his employment activities and checked "no" to the question on whether there was any history or evidence of concurrent or preexisting injury or disease or physical impairment.

By letter dated September 28, 1995, the Office informed appellant that the employing establishment was not obligated to extend or grant continuation of pay benefits because of an alleged disability for work based on the fact that appellant was employed as a temporary worker and his last workday was September 30, 1995. The letter advised appellant that its decision concerned continued pay only and did not affect his entitlement to other compensation benefits.

By letter dated February 22, 1995, the Office requested additional information from appellant. They inquired as to whether appellant had any similar symptoms or disability before and to describe the prior condition and provide names and addresses of the physicians who treated him and the approximate dates of treatment. Appellant was also asked to arrange for the submission of all treatment notes. The Office advised appellant that the evidence contained in the compensation record showed that he suffered from preexisting, nonwork-related degenerative arthritis of the thoracic and lumbar spine.

Appellant provided no additional information about the prior history and previous injury he listed on Form CA-7.

By decision dated October 3, 1995, the Office found that appellant was not entitled to compensation on or after October 1, 1994 on the grounds that the evidence failed to demonstrate that the claimed disability was causally related to his accepted employment injury.

By letter dated August 1, 1996, appellant requested reconsideration of the October 3, 1995 decision.<sup>1</sup> No evidence or arguments were advanced in support of his reconsideration request.

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<sup>1</sup> The Office approved appellant's request to cancel his hearing before an Office hearing representative.

By decision dated August 28, 1996, the Office denied appellant's request for reconsideration finding that he had not submitted any evidence or advanced any legal contentions warranting a review of the October 3, 1995 decision.

The Board finds that appellant has failed to meet his burden of proof to establish that his condition or disability on or after October 1, 1994 is causally related to his September 29, 1994 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, and that the claim was filed within the applicable time limitation of the Act.<sup>3</sup> The claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.<sup>4</sup> The mere manifestation of a condition during a period of employment does not raise an inference of causal relationship between the condition and the employment.<sup>5</sup> Neither the fact that the condition became apparent during a period of employment nor the claimant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.<sup>6</sup>

In this case, the record shows that appellant sustained a lumbosacral strain on September 29, 1994 while in temporary employment with the employing establishment. His temporary employment ended September 30, 1994. Although appellant argues in his Form CA-7 that he is entitled to continuation of pay starting September 29, 1994 onward, the Office properly found that as appellant was a temporary worker with his last official workday being September 30, 1994, he was not entitled to continuation of pay benefits for September 30, 1994.

The record from October 1, 1994 onward is devoid of any medical opinion evidence supporting an injury-related disability causally related to the September 29, 1994 employment injury. Dr. Maloney's reports provide the only medical evidence indicating a causal relationship between appellant's accepted employment injury and his condition on and after October 1, 1994. Although Dr. Maloney indicated on his August 4, 1995 Form CA-20 report that appellant was totally disabled during the periods claimed, he checked "no" to the question indicating whether there was a history or evidence of concurrent or preexisting injury or disease or physical impairment. Appellant admitted, on the CA-7 form, box 12(a)-(c), that he suffered back and stress problems while serving for the armed forces of the United States. Moreover, Dr. Maloney

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> *Donald R. Vanlehn*, 40 ECAB 1237, 1238 (1989).

<sup>4</sup> *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

<sup>5</sup> *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

<sup>6</sup> *Bruce E. Martin*, 35 ECAB 1090, 1093 (1984); *Dorothy P. Goad*, 5 ECAB 192, 193 (1952).

had documented that fact in his medical report of April 28, 1995 wherein he noted that appellant suffered a previous low back injury in 1983 and had some difficulty with back pain between 1964 and 1969 while serving in the air force. Since there are historical indications of preexisting, nonwork-related problems relating to appellant's back, Dr. Maloney's opinion, which is based on a history of no prior or underlying conditions, is of insufficient probative value to establish causality because of the incorrect medical history upon which it was based.<sup>7</sup>

Thus, as appellant has failed to provide any rationalized medical evidence establishing that he sustained a medical condition or disability on and after October 1, 1994 causally related to his September 29, 1994 employment injury or any other factors of his employment, he has failed to discharge his burden of proof.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

Following the Office's October 3, 1995 decision, appellant requested reconsideration but did not submit any additional evidence or raise any substantive legal questions.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>8</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>9</sup>

Inasmuch as appellant failed to submit any medical evidence or advance substantive legal contentions in support of his request for reconsideration, appellant's reconsideration request is insufficient to require the Office to reopen the claim for further consideration of the merits. Moreover, appellant was previously advised of what was needed to require the Office to reopen his case in the list of appeal rights which were enclosed with the Office's decision of October 3, 1995.

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<sup>7</sup> *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

<sup>8</sup> 20 C.F.R. § 10.138(b)(1).

<sup>9</sup> 20 C.F.R. § 10.138(b)(2); *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Workers' Compensation Programs dated August 28, 1996 and October 3, 1995 are hereby affirmed.

Dated, Washington, D.C.  
October 7, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member